IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 520

L. T. BARRINGER AND COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

BRIEF ON BEHALF OF THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, GULF, COLORADO AND SANTA FE RAILWAY COMPANY, PANHANDLE AND SANTA FE RAILWAY COMPANY, MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, AND THE KANSAS CITY SOUTHERN RAILWAY COMPANY, RAILROAD APPELLEES.

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STATEMENT OF THE CASE.

The Proceedings in the District Court.

The appellant, a cotton merchant of Memphis, Tennessee, filed bill of complaint in the District Court on or about May 11, 1942, to perpetually enjoin and set aside the operation and effect of an order of the Interstate Commerce Commission, Division 3, in *Investigation and Sus-*

pension Docket No. 1981, Loading Cotton in Oklahoma, 248 I. C. C. 643, issued January 29, 1942, to become effective, as postponed, on April 21, 1942. The United States of America and the Interstate Commerce Commission were named as defendants (R. 1-9).

The Atchison, Topeka and Santa Fe Railway Company, Gulf, Colorado and Santa Fe Railway Company, Panhandle and Santa Fe Railway Company, Missouri-Kansas-Texas Railroad Company, and The Kansas City Southern Railway Company, respondents in the proceedings before the Interstate Commerce Commission, were, by order of the District Court entered on June 29, 1942 (R. 65), pursuant to authority of Sections 212 and 213 of the Judicial Code (Title 28, U. S. C., Sec. 45a), permitted to intervene as parties defendant in the proceedings below (R. 60-65). The Oklahoma Railway Company was a respondent before the Commission, but did not intervene in the court below.

July 17, 1942, the District Court, in a *per curiam* opinion (R. 85), accompanied by its findings of fact and conclusions of law (R. 78-84), found that the Interstate Commerce Commission, in its report, made essential basic findings of fact, supported by substantial evidence of record; and that the order of the Commission is lawful. Final decree dismissing the complaint was entered August 17, 1942 (R. 85). From that decree direct appeal was taken to this Court.

The Proceedings Before the Commission.

By tariffs filed with the Commission to become effective June 11, 1941, and later, appellees, and the Oklahoma Railway Company, proposed to cancel the loading charge on shipments of cotton transported at carload rates from points in Oklahoma to certain Gulf ports, namely, Beaumont, Corpus Christi, Galveston, Houston, Orange, Port

Arthur, and Texas City, Texas, and Lake Charles, Louisiana (R. 14, 79, 109-111). Protests against said tariffs were filed with the Commission by L. T. Barringer and Company, appellant herein, New Orleans Joint Traffic Bureau, and others (R. 14, 79, 103-105). The Commission, acting under authority conferred upon it by Section 15(7) of the Interstate Commerce Act,* entered an order on June 10, 1941, which suspended the operation of said tariffs until January 11, 1942, and instituted an investigation into the lawfulness thereof. The proceeding was designated *Investigation and Suspension Docket No. 4981, Loading Cotton in Oklahoma*, and railroad appellees and the Oklahoma Railway Company were named as respondents therein (R. 11-12, 79). Subsequently, respondents further postponed the effective date of said tariffs until the termination of the proceedings before the Commission (R. 14, 79-80).

January 29, 1942, after full hearing, brief, and oral argument, the Commission, by Division 3, entered a report in I. & S. Docket No. 4981 setting forth its findings of fact and conclusions, and holding that the elimination of the loading charge on cotton originating in Oklahoma on respondents' lines, compressed in transit, and moving from compress points to the Texas Gulf ports and Lake Charles, La., at the carload rate from origin point, was just and reasonable and not otherwise unlawful (R. 13-33, 80) (248 I. C. C. 643). With said report, and as a part thereof, the Commission entered an order dated January 29, 1942, which vacated and set aside the previously entered order of suspension in I. & S. Docket 4981 as of February 21, 1942, and discontinued the proceeding (R. 33-34, 80).

February 18, 1942, appellant herein filed petition for reconsideration with the Commission (R. 35-54, 80), and the Commission, pending action on the petition, deferred the

* This, and other sections of the Interstate Commerce Act, hereinafter referred to as the Act, which are pertinent to the issues, are reproduced in Appendix A hereto.

effective date of its order of January 29, 1942, to April 21, 1942 (R. 80). Railroad appellees, on March 14, 1942, filed a reply to said petition (R. 285-290), and the Commission, on April 13, 1942, denied said petition and permitted the tariffs under consideration to become effective on April 21, 1942 (R. 80). Such tariffs are now in effect (R. 80).

History of the Tariffs and Justification Therefor.

For many years the carriers maintained only l.c.l. or any-quantity rates on cotton originating in the Southwest and performed all necessary loading services just as in the case of any other l.c.l. freight. However, August 7, 1933, the southwestern carriers instituted a system of carload rates on cotton primarily for the purpose of meeting truck competition. These so-called carload rates were reviewed by the Commission and, subject to a revision of certain rate relations, were found lawful in Docket No. 26235, *Cotton from and to Points in Southwest and Memphis*, 208 I. C. C. 677. They were in the nature of any-quantity rates inasmuch as they provided for the accumulation of cotton in small quantities from gin points to compresses or concentrating stations and for the reshipment therefrom to ultimate destination in carload lots, subject to certain minima designed to encourage heavy loading. For all practical purposes, the transportation of cotton under the so-called carload rates is identical with the transportation of cotton on l.c.l. or any-quantity rates. The through charges are ultimately settled under a transit arrangement on the basis of the carload rates from first origin to final destination (R. 78-79, 111-114).

When the carload system of rates was initially established, and for several years thereafter, the carriers imposed the obligation of loading the cotton at gin origins on the shipper under the rates established. They fur-

ther provided that when carriers loaded the cotton at shipper's request, a charge therefor, amounting to five cents per square bale and 2½ cents per round bale would be assessed.* This loading arrangement was established in order to permit the carriers to engage in the transportation of cotton under a system which would net them the greatest possible revenues out of the severely depressed rates caused by motor truck competition (R. 115)—an objective specifically approved by the Commission in *Cotton from and to Points in Southwest and Memphis*, 208 I. C. C. 677, 691.

For a period of time the carload system of rates maintained by the carriers was successful in meeting the truck competition. However, during 1938-1939, the trucking of cotton to the Texas Gulf ports became more prevalent, and the rail carriers serving Oklahoma and Texas found it necessary to take drastic action. Most of the cotton trucked was to the Texas Gulf ports from Texas origins. Trucking from Oklahoma to the Texas Gulf ports was not as acute. In addition to the trucking to Texas Gulf ports, there was a tremendous increase in the trucking from country stations to compress points. The rail carriers analyzed the situation and discovered that the loading charge established in connection with the system of carload rates was considered a nuisance by cotton producers and shippers alike and was responsible in large measure for the diversion of cotton traffic to the trucks (R. 115-116).

In order to meet this situation, effective October 15, 1939, a tariff item was published applicable on cotton traffic originating within the State of Texas which provided that the rail carriers would load cotton tendered to them at origins in Texas at their depots or cotton platforms and

*Increased to 5½¢ per square bale and 2¾¢ per round bale under *Ex Parte* 123, *In the Matter of Increases in Rates, Fares and Charges*, 226 I. C. C. 41.

would bear the expense of such loading (R. 153-155, 159, 165). Effective October 28, 1939, the Railroad Commission of Texas granted similar authority for intrastate application (R. 165). Division 2 of the Interstate Commerce Commission refused to suspend the interstate tariff (R. 29-30, 155).

There was also under consideration at the same time a reduction in the through rail rates from the Southwest, including Oklahoma, for the purpose of more adequately meeting truck competition, which revision was accomplished on June 20, 1940. Because of opposition of some of the interested rail carriers to the elimination of the loading charge in Oklahoma, and because it was desired to determine the extent to which the reduced rates would be effective in combatting the movement of cotton by truck from points in Oklahoma, no action was taken at that time toward the establishment of the Texas free-loading provision at points in Oklahoma (R. 116-117).

While the rate reductions were helpful, they by no means satisfied the Oklahoma shippers, and the rail carriers received constant complaints and threat of loss of traffic from Oklahoma origins because of their failure to remove the loading charge from such origins to the same extent that it had been removed from Texas origins (R. 117). In recognition of this situation, and for the purpose more effectively of meeting truck competition from Oklahoma origins, railroad appellees and the Oklahoma Railway Company provided for the elimination of the loading charge on cotton from points in Oklahoma to the Texas Gulf ports above named and Lake Charles, Louisiana (R. 111, 128). The rule is published both in the transit tariffs and the rate tariffs (R. 135).

Railroad appellees' action in eliminating the loading charge on cotton to the same extent from Oklahoma origins as from Texas origins is in harmony with Finding 8 of the

Commission's decision in *Cotton from and to Points in Southwest and Memphis*, 208 I. C. C. 677, 732, wherein it held that with respect to southwestern points of origin on the one hand, and Lake Charles and the Texas Gulf ports on the other hand, the maintenance of an interstate carload rate from any point of origin to any port higher for substantially the same distance than the interstate carload rate from the same point of origin to another port or from another point of origin to the same port, resulted and would result in undue prejudice to the cotton traffic upon which such higher level of rates was maintained and to the shippers thereof, and in undue preference of the traffic upon which the lower level was maintained and the shippers thereof (R. 128).*

The absorption by railroad appellees and the Oklahoma Railway Company of the loading charge on cotton from Oklahoma origins does not have unlimited application. Because of the opposition of some rail carriers in whose opinion the establishment of free loading of cotton in Oklahoma would prove unduly costly, its application was restricted to the Texas Gulf ports above named and Lake Charles, La., instead of to the wider destination territory permitted in the Texas tariffs (R. 18, 25-26, 129, 130, 134, 161-162). Because there is no truck movement of cotton from Oklahoma to the Southeast, and because the rates on cotton to the Southeast are already lower relatively than they are to the Texas Gulf ports, the tariffs of the carriers do not provide for the elimination of the loading charge on cotton from points in Oklahoma to the Southeast (R. 122, 137).

* Prior to publication of the tariffs under consideration, the Corporation Commission of Oklahoma filed complaint with the Oklahoma carriers alleging that they had failed to comply with Finding 8 of the Commission's decision by failing to establish free loading of cotton from Oklahoma origins to Texas Gulf ports to the same extent that the rule had been established from Texas origins (R. 17-18, 128).

The Questions Presented.

The questions presented in this cause may be summarized as follows:

(1) Is the order of the Commission invalid because based upon improper standards of lawfulness?

(2) Is the order of the Commission supported by essential findings?

(3) Are the findings and ultimate conclusions of the Commission supported by the evidence?

SUMMARY OF ARGUMENT.

Railroad appellees, with the approval of the Interstate Commerce Commission, absorb the loading charge formerly assessed by them on shipments of cotton moving from Oklahoma origins, in transit, to the Texas Gulf ports and Lake Charles, Louisiana. They do not absorb the similar loading charge on shipments of cotton moving from the same origins, in transit, to the Southeast.

Appellant, which ships cotton to the Southeast, claims the right to equality of treatment under the provisions of the Interstate Commerce Act. It contends that removal of the loading charge in the case of shipments to the Texas Gulf ports and Lake Charles, Louisiana, and its continuance to the Southeast offends the provisions of Section 2 of the Act prohibiting unjust discrimination and the provisions of Section 3(1) of the Act prohibiting undue or unreasonable prejudice or disadvantage.

Appellant's contentions are without merit. To constitute violation of Section 2 the shipments claimed to be favored and the shipments claimed to be subjected to unjust discrimination must move from and to the same points, for the same distance and over the same route of movement. Obviously, appellant's shipments which move from Oklahoma to the Southeast do not move from and to the same points, for the same distance, and over the same route of movement, as shipments from Oklahoma to the Texas Gulf ports and Lake Charles, Louisiana.

To constitute violation of Section 3(1) the shipments claimed to be favored and the shipments claimed to be prejudiced must move under the same circumstances and conditions. Difference in the extent and character of

truck competition and the relative profitableness of the transportation constitute dissimilar circumstances and conditions warranting different relations of rates and charges under Section 3(1). The existence of truck competition between Oklahoma and the Texas Gulf ports and the absence thereof between Oklahoma and the Southeast as well as the fact that rates from Oklahoma to the Southeast are relatively lower than rates from Oklahoma to the Texas Gulf ports permit absorption of the loading charge in the case of shipments destined to the Texas Gulf ports and continuance thereof in the case of shipments destined to the Southeast without violation of the provisions of Section 3(1).

The line-haul rates for transportation, plus charges for accessorial services, if any, constitute the total freight charges paid for the services rendered by the railroads. While separately published, charges for accessorial services, if any, result in increased or decreased ultimate total charges to the shipper or consignee. Therefore, separate charges, if any, for accessorial services such as loading must be considered, together with the line-haul rates for transportation, in determining whether or not the provisions of Sections 2 and 3(1) of the Interstate Commerce Act have been violated.

The order of the Commission is adequately supported by appropriate findings and is based upon evidence of record. Its report clearly reveals the basis of its ultimate determination that cancellation of the loading charge was just and reasonable and not otherwise unlawful and discloses the facts and circumstances upon which it was predicated.

ARGUMENT.

The Order of the Commission Is Based Upon Proper Standards of Lawfulness.

Railroad appellees contend that elimination of the loading charge on shipments moving at the carload rate from points in Oklahoma to the Texas Gulf ports and Lake Charles, Louisiana, without at the same time eliminating the loading charge on shipments from points in Oklahoma to points in the Southeast, is entirely lawful and proper because (1) there is no trucking of cotton from Oklahoma to the Southeast, and (2) the rail rates to the Southeast are relatively lower than the rail rates to the Texas Gulf ports.

Appellant contends that the elimination of the loading charge on cotton from Oklahoma origins to the Texas Gulf ports and Lake Charles, La., without at the same time discontinuing such charge in the case of shipments from Oklahoma to the Southeast, is in violation of Sections 2 and 3(1) of the Interstate Commerce Act, and that the order of the Commission declaring the practice of railroad appellees in such respect to be just and reasonable and not otherwise unlawful, is invalid because based upon improper standards of lawfulness.

For convenience, the lawfulness of the tariffs under consideration and the validity of the Commission's order upholding the same, will be separately discussed in relation to the provisions of Section 2 and Section 3(1) of the Act.

Section 2.

Section 2 of the Act prohibits any common carrier subject to the provisions thereof from directly or indirectly charging, demanding, collecting or receiving, "from any

person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, * * * than it charges, demands, collects or receives from any other person or persons for * * * a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions * * *."

However, the provisions of Section 2 have application only to the transportation of property between the same points, for the same distance, and over the same route of movement. In *Wight* v. *United States* (1897), 167 U. S. 512, this Court expressly held that the provisions of Section 2 have application only when shippers, said to be unequally treated, make shipments "over the same line, the same distance, under the same circumstances of carriage." (p. 518.)

In the *Wight* case, it appeared that both the Pittsburgh, Cincinnati, Chicago & St. Louis Railway, popularly known as the "Panhandle", and the Baltimore & Ohio Railroad provided transportation service between Cincinnati and Pittsburgh, and that there was effective via both roads a 15 cent rate for the transportation of beer between Cincinnati and Pittsburgh. The "Panhandle" applied the rate of 15 cents to the industry of one Bruening, located upon an industrial siding on its line at Pittsburgh. The Baltimore & Ohio, which also carried the 15 cent rate to Pittsburgh, did not reach Bruening's brewery with its own rails, and in order to equalize the competitive advantage enjoyed by the "Panhandle", first offered to perform the cartage from its freight depot in Pittsburgh to Bruening's brewery free of charge, and then arranged that Bruening himself should do the hauling, for which he was allowed 3½ cents per 100 pounds. One Wolf also operated a brewery at Pittsburgh, but was not located upon the rails of any carrier, and was obliged to pay the full 15 cent rate between Cincinnati and Pittsburgh, plus the cost of cartage, to get his shipments to his brewery because the Baltimore

& Ohio refused to make him an allowance similar to that made by it to Bruening. The Baltimore & Ohio was indicted and convicted for violation of Section 2. The conviction was sustained by this Court because the Baltimore & Ohio, in effect, charged Bruening only 11½ cents for the same line-haul transportation for which it charged Wolf the full 15 cents. In the course of its opinion, the Court stated:

> "The wrong prohibited by the section is a discrimination between shippers. It was designed to compel every carrier to give equal rights to all shippers *over its own road* and to forbid it by any device to enforce higher charges against one than another. * * * But the service performed in transporting from Cincinnati to the depot at Pittsburgh was precisely alike for each. The one shipper paid 15 cents a hundred; the other, in fact, but 11½ cents. It is true he formally paid 15 cents, but he received a rebate of 3½ cents, *and regard must always be had to the substance, and not to the form.* * * * It was the purpose of the section to enforce equality between shippers, and it prohibits any rebate or other device by which two shippers, *shipping over the same line, the same distance, under the same circumstances of carriage*, are compelled to pay different prices therefor." (pp. 517-518.) (Emphasis supplied.)

Pursuant to the above-quoted statement of this Court, there can be no violation of the provisions of Section 2 unless the shipper alleged to be prejudiced ships his property from and to the same points, for the same distance, and over the same route of movement as the shipper alleged to be preferred. The interpretation of Section 2 by the Court in the *Wight case* has been uniformly and consistently applied by the Interstate Commerce Commission in its decisions over the course of a great many years. *Capital City Gas Co.* v. *Central of Vermont Ry. Co.* (1905), 11 I. C. C. 104, 106-107; *Ft. Smith Traffic Bureau* v. *St. L. S. F. R. R. Co.* (1908), 13 I. C. C. 651, 656; *Richmond Chamber of Commerce* v. *Seaboard Air Line Railway Co.*, (1917),

44 I. C. C. 455, 466, (Commission's decision assailed upon another point and sustained, 249 Fed. 368, 254 U. S. 57); *Tidewater Oil Company* v. *Director General* (1921), 62 I. C. C. 226, 227; 73 I. C. C. 528; *Cane Sugar from Wisconsin to Minnesota* (1934), 203 I. C. C. 373, 376; *Laurenceville Cooperage Co.* v. *A. C. & Y. Ry. Co.* (1938), 226 I. C. C. 773, 781; *Miller Waste Mills* v. *C. M. St. P. & P. R. Co.* (1938), 226 I. C. C. 451, 453.

In *Richmond Chamber of Commerce* v. *Seaboard Air Line Railway Co.*, 44 I. C. C. 455, 466, the Commission considered the question whether the absorption of certain switching charges at Richmond, Va., constituted unjust discrimination under Section 2, and stated:

> "It is the line-haul movement which that Section primarily contemplates * * *."
>
> "The carriers' refusal to absorb the switching charges on traffic to and from strictly local points is justifiable. In such instances the transportation service is substantially dissimilar, for the movement is either over a different line or, if over the same line, for a substantially different line haul." (p. 466.)*

In *Tidewater Oil Co.* v. *Director General*, 62 I. C. C. 226, 227, the Commission considered a somewhat similar situation at Bayonne, N. J., and following the principle announced in the foregoing decision, stated:

> "While the absence of competition does not prevent a finding of unjust discrimination under section 2, to sustain such a finding it must appear that the transportation services are like and contemporaneous and are performed under substantially similar circumstances and conditions, and that the property transported is like traffic. But it is the line haul to which section 2 primarily relates, and if the movement is

* This portion of the Commission's decision was not under consideration in *Seaboard Air Line Railway Co.* v. *United States*, 254 U. S. 57. In that decision, the question considered was whether unjust discrimination resulted from the absorption of switching charges in connection with line-haul transportation between the same points of origin and destination. See *Federal Match Corporation* v. *Great Northern Railway Co.*, 102 I. C. C. 353, 128 I. C. C. 415.

either over a different line or, if over the same line, for a substantially different haul, the transportation service is substantially dissimilar. *Richmond Chamber of Commerce* v. *S. A. L. Ry.*, 44 I. C. C. 455, 466; *Wight* v. *U. S.*, 167 U. S. 512." (p. 227)

In *Cattle-Raisers Assn.* v. *Fort Worth & D. C. Ry. Co.* (1898), 7 I. C. C. 513, the Commission, although recognizing that the reasonableness of a terminal charge must be separately considered (p. 538), similarly held that the absorption of a terminal charge in one instance and failure to do so in another does not constitute unjust discrimination under Section 2, unless the line-haul transportation in both instances is between the same points, over the same railroad, and in the same direction (pp. 539-540).

The absorption by carriers of a loading charge is the same as the absorption by carriers of the switching charges in the Commission cases above mentioned. In the instant case, rail appellees absorb the loading charge in connection with shipments of cotton from Oklahoma to the Texas Gulf ports and Lake Charles, Louisiana. They do not absorb the loading charge in connection with shipments of cotton from Oklahoma to the Southeast. Appellant ships cotton from Oklahoma to the Southeast. Its shipments do not, therefore, move from and to the same points as the shipments with respect to which the loading charge is absorbed. They do not move for the same distance or over the same routes of movement as the shipments with respect to which the loading charge is absorbed. Accordingly, the provisions of Section 2 of the Act, as interpreted by this Court in the *Wight case*, and uniformly and consistently applied by the Interstate Commerce Commission, are not violated by the tariffs under consideration herein.

Appellant admits that it has no case under Section 2, if the provisions of that section have application only to shipments moved for the same distance over the same route of movement as above indicated (Br. 37). However, it

contends that the provisions of Section 2 were intended to have application in instances where there is a dissimilarity in the matter of line-haul services. It admits that Section 2 was patterned after Section 90 of the English Railway Clauses Consolidation Act of 1845, known as the "Equality Clause," which prohibits unequal charges on goods when "passing only over the same portion of the line of railway under the same circumstances;" but contends there is a fundamental difference in phraseology between the two statutes which evidences an intent on the part of Congress to have Section 2 apply independently to all separately stated accessorial services and charges; such as loading, despite dissimilarity in the line-haul transportation (Br. 37).

But, in the *Wight case*, this Court expressly held that accessorial charges and terminal services must be considered along with the charges for the line-haul movement of traffic in determining whether or not the provisions of Section 2 have been violated. The Court said:

> "And Section 6 of the act, as amended in 1889, throws light upon the intent of the statute, for it requires the common carrier in publishing schedules to 'state separately the terminal charges, and any rules or regulations which in any wise change, effect or determine any part or the aggregate of such aforesaid rates and fares and charges.'" (pp. 517-518.)

Appellant states that if it be true that Section 2 applies to a difference in charges for identical accessorial services only when the line-haul services are likewise identical, a preliminary finding to the latter effect would be jurisdictional whenever a Section 2 order is issued; but that in *Merchants' Warehouse Co.* v. *United States*, 283 U. S. 501, 511, this Court sustained an order of the Commission based on a finding of unjust discrimination although the report of the Commission completely ignored the matter of the line-haul services (Br. 39). But the precise point seems

not to have been considered by the Supreme Court in the *Merchants Warehouse case*. Moreover, in that case, the Court stated that "Section 2 forbids the carrier to discriminate by way of allowances for transportation services given to one, in connection with the delivery of freight at his place of business, which it denies to another in like situation." (p. 511.) The Court did not undertake to say what shippers or classes of shippers should be regarded as placed in a like situation. Obviously, in like situation, for the purposes of Section 2, requires shipments of goods between the same points, over the same road, for the same distance of movement, as expressly held in the *Wight case, supra.*

The fact that separate charges for accessorial services must be considered, together with the line-haul rates for transportation in determining whether or not the provisions of Section 2 have been violated, may not be seriously questioned. Section 2 prohibits the imposition and collection of unequal charges for like services "in the transportation of passengers or property," and transportation services, by express statutory definition, include accessorial services as well as line-haul movement of traffic. Paragraph (3)(a) of Section 1 of the Interstate Commerce Act defines the term "transportation", used in the Act, to include all services in connection with the handling of property transported, and paragraph (1) of Section 6 of the Act requires carriers to publish and file all rates and charges for transportation between different points on its own route, and between points on its own route and points on the route of any other carrier by railroad, and to "state separately all terminal charges * * * which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, fares and charges, or the value of the service rendered to the * * * shipper or consignee."

Obviously, the handling charges referred to in para-

graph (3)(a) of Section 1 and the terminal charges referred to in paragraph (1) of Section 6 must be added to the rates for line-haul transportation to determine the aggregate of the rates, fares and charges for transportation, and cannot be separately considered under Section 2 without relation to the line-haul rates for transportation. That the Commission so considered the matter is evidenced by the fact that it stated in its order of suspension, entered June 10, 1941:

> "* * * Said schedules make certain reductions in rates for the transportation of cotton, carloads, in interstate and foreign commerce * * *" (R. 11-12).

While not published as a part of the line-haul rates for transportation, handling and terminal charges result in increased or decreased ultimate total charges to the shipper or consignee. It is the line-haul rates for transportation plus the handling and terminal charges, if any, which constitute the total freight charges paid for the services rendered by the railroads.* In *Sun-Maid Raisin Growers Assn.* v. *United States* (1940), 33 Fed. Supp. 959, affirmed 312 U. S. 667, the statutory court, composed of Wilbur, Circuit Judge, and St. Sure and Roche, District Judges, recognized that the cost of handling freight constitutes merely a separate component of the total charge for transportation. The court, after discussing the decisions of the Supreme Court in other situations, including *Interstate Commerce Commission* v. *Stickney*, 215 U. S. 98, stated:

> "There is nothing in any of these Supreme Court decisions cited by the plaintiffs which justifies the conclusion that the railroads were prohibited by law from making a separate charge for *items involved in transportation which might otherwise be included in the gen-*

* Mr. J. G. Jay, witness for respondents, testified as follows:

"Q. I am inquiring if that same cotton had moved by rail, contrasting the present tariff with what you propose to put in the tariff, will there be any change in the rail freight rates to be paid? A. There would be no change in the rail freight rates but there would be a change in the total charge amounting to five and a half cents a bale". (R. 139.)

eral freight rate if the tariff schedules make it clear that they are not so included in the general freight rate. Other decisions assume, if they do not formally approve, separate charges in a tariff.

* * * * * *

"We conclude that neither the common law nor the Shipping Act, 46 U. S. C. A., Sec. 816, Shipping Act Sec. 17, *supra*, forbids the separation, by a steamship company, of a freight charge *into some of its component elements* if the tariff clearly so provides." (p. 961.) (Emphasis supplied.)

In *United States* v. *Chicago & Alton Ry. Co.*, 148 Fed. 646, affirmed 156 Fed. 558, 212 U. S. 563, the District Court of the United States for the Northern District of Illinois stated that the word "rate" as used in the Interstate Commerce Act means the net cost to the shipper of the transportation of his property. The Court stated (148 Fed. 646, 647):

"* * * The word 'rate,' as used in the interstate commerce law, means the net cost to the shipper of the transportation of his property; that is to say, the net amount the carrier receives from the shipper and retains. In determining this net amount in a given case, all money transactions of every kind or character having a bearing on, or relation to, that particular instance of transportation whereby the cost to the shipper is directly or indirectly enhanced or reduced must be taken into consideration." (p. 647.)

Appellant states that in cases involving Section 2 as applied to charges for line-haul services, this Court has consistently held that the circumstances legally entitled to consideration do not include differences in circumstances arising either before the service of the carrier or after it is terminated, citing in this connection *Interstate Commerce Commission* v. *Delaware L. & W. R. R. Co.*, 220 U. S. 235, 253-254, and *Interstate Commerce Commission* v. *Baltimore & Ohio R. R. Co.*, 225 U. S. 326, 342-343 (Br. p. 40). In those cases, however, the circumstances

sought to be considered as justifying unequal charges between shippers were plainly outside the orbit of transportation, *i. e.*, ownership or non-ownership by the shipper of the goods tendered for transportation (220 U. S. 235), and differences with respect to competition between coal intended for railway consumption and other coal (225 U. S. 326). The loading charge under consideration herein is not a circumstance arising before the service of the carrier is begun or after it is terminated. It is a part of the actual transportation service rendered by the carrier.

In *A. T. & S. F. Ry. Co. v. United States*, 232 U. S. 199 (1914), the loading service was considered by the court to be an element properly affecting the carload rates for transportation. In the course of its opinion in that proceeding, the Supreme Court stated:

> "For in the shipment of fruit, as in that of other articles, it is impossible to lay down a rule which definitely fixes what loading includes and by whom it must be done. Nor is there any consistent practice on this subject, since from reported cases it appears that the claims of the parties are based rather on interest than on some definite principle. Sometimes the shipper, as here, insists on the right to load and provide necessary appliances. At other times he demands that such service and appliances be furnished by the railroad company. Conversely the carriers sometimes claim, as here, the right to furnish service and facilities, while in other cases insisting that one or both must be supplied by the consignor. Cf. *National Lumber Dealers Association* v. *Atlantic Coast Line*, 14 I. C. C. 154; *Schultz* v. *Southern Pacific*, 18 I. C. C. 234; *In re Allowance for Lining and Heating Cars*, 26 I. C. C. 681; 25 I. C. C. 497 (pp. 215-6).
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>
> "The interest of the public is to be considered as well as that of shippers and carriers—their rights in turn having been adjusted by a reduction in the rate, if the loading is done in whole or in part by the shipper; and by an increase in the rate where the

loading is done in whole or in part by the carrier (p. 217).

"What is a proper rate on fruit in pre-cooling shipments, or a fair charge for hauling necessary ice or rendering other transportation services are all rate-making matters committed to the Commission. It may determine what shall be the difference in rate between carload and less than carload lots. *It may decide whether the difference in revenue, due to a difference in method of loading, warrants a difference in the rate on carload shipments of the same article*" (pp. 220-221). (Emphasis supplied.)

For many years, by virtue of custom and usage, and special statutory, contractual and tariff provisions, the burden of loading and unloading carload freight has been placed upon shippers and receivers. However, in the absence of understanding or agreement to the contrary, transportation includes loading and unloading. It is the primary duty of the carrier properly to load and unload freight delivered to it for transportation. *The A. T. & S. F. Ry. Co. v. United States*, 295 U. S. 193, 198; *Adams v. Mills*, 286 U. S. 397, 409-410, 414-415; 13 *Corpus Juris Secundum* 123. When performed by the carrier under its regularly published tariffs, the service of loading or unloading unquestionably constitutes a part of transportation.

Appellant states that railroad appellees cannot escape the application of Section 2 separately to the loading charges and services because other carriers which have no control over the loading services and charges and do not participate therein, but which participate with appellees in the through line-haul movement, transport the traffic in line-haul services to a variety of destinations (Br. p. 41). The extent of control exercised by the other carriers appears immaterial. However, appellant's contention in this respect is erroneous. The other carriers do exercise a very

potent influence with respect to the establishment, maintenance or removal of the loading charges and services. While the loading charges and services themselves are subject only to the direct control of appellees, they may not, as a practical matter, be placed in effect or removed without the approval of the other carriers participating in the line-haul movement since their approval thereof must be obtained in order to secure their concurrence in the line-haul tariffs providing for the through movement of the traffic. The situation is well illustrated by the following quoted testimony of Mr. J. G. Jay, witness for respondents, in response to inquiry whether the loading charge would be removed in the case of shipments moving through Little Rock Arkansas, and Memphis, Tennessee, as well as in the case of shipments moving from points in Oklahoma, if the tariffs under consideration were approved by the Commission.

"Q. (By Mr. Bennett.) If the Commission approves the suspended tariff—that is your suspended tariff, will it be the Santa Fe's intention to remove the charge on cotton that is concentrated at Little Rock and Memphis or any other point in the Mississippi Valley territory and subsequently reshipped to points where through rates apply through such transit points? (R. 147.)

* * * * *

"The Witness: I have already stated that we would have no objection to performing free loading of traffic to all destinations. But, as I understand your question, Mr. Bennett, you want to know if it is our intention to proceed to do it.

"Q. (By Mr. Bennett.) My question is this: That if the Commission approves the suspended tariffs, will you remove the charge on cotton that is concentrated at Little Rock and Memphis and other points in that section that is reshipped to points where the through rates apply? (R. 148.)

* * * * *

"The Witness: I will answer it for you: We have no program to do that right now, but, obviously, for

the portion of the traffic that is now moving to the southeast, which we would like to control by having freight bills from our local points into the compress points, rather than having it trucked, we may find it necessary to reopen the question with the Southwestern lines of performing free loading to the southeast, but I can't say that we would put it in because we don't serve the river gateways and some of the other lines may refuse to participate with us in rates or routes in connection with which free loading is performed." (R. 148-149.)

The destination carriers participating in the through movement of the traffic from Oklahoma points of origin virtually control the assessment or non-assessment of loading charges because the originating lines who have control over the publication of tariff provisions respecting the loading charges and services are obliged to secure the concurrence of the destination carriers in the line-haul tariffs covering the through movement of the traffic. They may not, as in *Central R. R. Co. of New Jersey* v. *United States*, 257 U. S. 247, relied upon by appellant (Br. pp. 41-42), be viewed as responsible for the establishment, maintenance or removal of accessorial charges and services at points of origin on the lines of other carriers. But, they most certainly have a controlling voice in the matter. In Finding No. 3, the District Court found that the loading charge is maintained and assessed by the individual railroad performing the loading service (R. 78). The court did not, however, find that the other carriers participating in the through movement do not exercise control over the maintenance or removal of the loading charge in the manner above stated. No carrier would entertain for a moment the idea of imposing or eliminating such a charge without the approval of its connections.

In *Interstate Commerce Commission* v. *Stickney*, 215 U. S. 98, also relied upon by appellant (Br. p. 42), this Court stated that the reasonableness of the separate

terminal charge for transporting live stock to the Union Stock Yards at Chicago must be determined independently of the prior charges for transportation over the lines of the carrier or of connecting carriers. In so holding, the Court was prompted by the necessity for protecting the terminal carrier which could not rightfully be deprived of a reasonable terminal charge because of amounts paid other carriers for line-haul transportation. However, the fact that under such circumstances the reasonableness of one of the separate components of the total charge for transportation must be separately determined, does not support the contention that the terminal charge must be separately considered when the question under consideration is whether or not one shipper is preferred over another under Section 2. The Commission has taken this view of the matter. In *Cattle Raisers' Association* v. *Ft. Worth & D. C. Ry. Co.*, (1898) 7 I. C. C. 513, the Commission, although recognizing that the reasonableness of a terminal charge must be separately considered (p. 538), held that the absorption of a terminal charge in one instance, and failure to absorb such a charge in another, does not constitute unjust discrimination under Section 2 unless the line-haul transportation in both instances is between the same points, over the same railroad, and in the same direction (pp. 539-540). Whether or not one shipper is favored over another in the matter of transportation can be determined only by considering the total charges for the line-haul transportation and the loading service, if any.

Appellant also states that the issue framed by the order of the Commission instituting the investigation requires the application of Section 2 to the loading charges and services independent of all other charges and services; that if Section 2 is inapplicable because the destinations are different, then the aggregate charges for the line-haul services plus the loading services must have been in issue, but that the line-haul services and charges were not in

issue before the Commission, nor did respondents before the Commission include the connecting railroads making up the through routes to the Southeast; and that "If thus appears that there was no issue under which the Commission could have dealt with the lawfulness of the aggregate of line-haul charges and of loading charges, even if it had so desired" (Br. p. 41).

The Commission necessarily suspended only the rate schedules published by appellees providing for the removal of the loading charge theretofore applied on cotton transported from Oklahoma to the Texas Gulf ports and Lake Charles, Louisiana. It could not have suspended the line-haul rates for the movement of traffic from Oklahoma to the Southeast because they had already become effective. The Commission could have refused to suspend the tariffs providing for elimination of the loading charge because of the obvious inapplicability of Section 2, except for the fact that the provisions of Section 3(1) of the Act hereinafter discussed were also involved. Appellant was by the order of suspension afforded an opportunity to establish its contention that the provisions of Section 3(1) had been violated. The lawfulness of the loading charge or its removal may, of course, be considered along with the line-haul rates for transportation, despite the fact that such line-haul rates are not placed in issue. They may be added to the loading charge, if any, in determining the total aggregate charges for transportation without challenging the reasonableness or lawfulness thereof.

Inasmuch as appellant's shipments of cotton are not made from and to the same points or over the same routes of movement as shipments of cotton from Oklahoma to the Texas Gulf ports and Lake Charles, La., the provisions of Section 2 of the Act do not have application, and it is unnecessary to consider whether differences in circumstances and conditions exist between appellant's shipments and the shipments to the Texas Gulf ports, within the

purview of Section 2. It may not be amiss, however, to point out the appellant's shipments are not made under the same circumstances and conditions as shipments from Oklahoma to the Texas Gulf ports inasmuch as the shipments from Oklahoma to the Texas Gulf ports are on a relatively higher rate basis than the shipments from Oklahoma to the Southeast, constituting a difference in circumstances and conditions justifying dissimilar treatment under Section 2 (R. 137). Certainly the matter of the relative profit earned from transportation over different routes of movement is a circumstance which must be considered. In *Texas & Pacif Ry. Co.* v. *Interstate Commerce Commission* (1896), 162 U. S. 197, 233, the Supreme Court stated

> "in passing upon questions arising under the act, the tribunal appointed to enforce its provisions * * * should consider the legitimate interests as well of the carrying companies as of the traders and shippers."

In conclusion of law No. 4, the District Court stated that, in determining whether or not the provisions of Section 2 of the Interstate Commerce Act have been violated by the publication of the tariffs under consideration, "the Commission properly considered the dissimilarity in circumstances and conditions between the line-haul movement of cotton from Oklahoma origins to the Southeast and the line-haul movement of cotton from the Oklahoma points to the Gulf ports * * *" (R. 84). For reasons hereinabove stated, the conclusion thus announced by the District Court is entirely sound and proper.

Section 3(1).

Section 3(1) of the Act provides that

> "It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, * * * or any particular description of traffic, in any respect whatso-

ever; or to subject any particular person, * * *, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage, in any respect whatsoever: * * *."

However, the absence of truck competition from points in Oklahoma to the Southeast as compared with the intense truck competition existing between Oklahoma and the Texas Gulf ports and Lake Charles, La., and the maintenance of relatively lower rates for transportation of cotton from Oklahoma to the Southeast than to the Texas Gulf ports and Lake Charles, La., constitutes dissimilarity of circumstances and conditions which justifies cancellation of the loading charge in the case of shipments destined to the Gulf ports and its continuance in the case of shipments destined to the Southeast, without violation of the provisions of Section 3(1).

Competition between rail carriers which affects the level of rates and charges for transportation was recognized many years ago as a factor warranting difference in the rate levels between different origins and destinations. The Supreme Court so held in *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission* (1896), 162 U. S. 197, 233-234, and reaffirmed its decision in *Interstate Commerce Commission* v. *Alabama Midland Ry.* (1897), 168 U. S. 144, 166.

Following the principles thus declared by the Supreme Court in the above decisions, the Commission has uniformly and consistently held that the existence of truck competition at one point and not another, or in greater degree at one point than another, warrants the imposition of lower rates at the point of competition or at the point of greatest competition, and that such dissimilarity in treatment does not constitute undue preference or undue prejudice. *Rate Structure Investigation, Part III, Cotton* (1931), 174 I. C. C. 9, 17; 176 I. C. C. 249, 253; *Solar Refining Co.* v. *Ann Arbor R. Co.* (1932), 182 I. C. C. 693, 697;

Consolidated Southwestern Cases (1932), 185 I. C. C. 357, 363; 188 I. C. C. 307, 309; *Cotton Exchange of Augusta* v. *A. C. L. R. Co.* (1932), 190 I. C. C. 513, 518; *Commodity Rates in Official Territory* (1935), 209 I. C. C. 703, 705; *Sugar from California to Chicago* (1935), 211 I. C. C. 239, 254; *Hudson County Coal Dealers Assn.* v. *C. R. R. Co. of N. J.* (1937), 219 I. C. C. 676, 681.

In *Railroad Commission of Wisconsin* v. *Ann Arbor R. R. Co.*, 177 I. C. C. 588, the Commission found that the addition of the transfer charge at Chicago to the charges of rail carriers for passenger transportation between Wisconsin and the southern peninsula of Michigan, while not adding such charge in the case of through fares of the rail carriers for transportation between other territories via Chicago, was not unreasonable, unjustly discriminatory, or unduly prejudicial. The Commission stated (p. 592):

> "Upon consideration of the whole record we are of the opinion and find that the addition to the through fares assailed of the charge for transfer between stations at Chicago is not unreasonable, and that the difference in competitive conditions affecting the transportation between territories where the transfer charge is absorbed, and those here considered where it is not, are sufficient to justify the practices complained of and consequently to make any discrimination and prejudice which may exist by reason of the absorption in the one instance and not in the other, neither unjust nor undue."

Appellant admits that competition between carriers warrants the establishment and maintenance of rates and charges which might otherwise constitute a violation of Section 3(1). At page 46 of its brief, it states that this Court has recognized that competition with other carriers may serve to justify a relation of rates which otherwise would appear to be unfair and prejudicial under Section 3(1), and that its claim of error involving the Commission's consideration of the difference in truck compe-

tition is, therefore, restricted to its discussion of the case under Section 2.

Relative profit to the carrier is a further circumstance which warrants a difference in the rates and fares charged shippers under the provisions of Section 3(1). More than a half century ago, in *Interstate Commerce Commission* v. *Baltimore & Ohio R. R. Co.* (1890), 43 Fed. 37, 53, Circuit Judge Jackson, whose judgment was later affirmed by the Supreme Court (145 U. S. 263), stated that the fair interest of the carrier and the relative cost of service and profit to the company were factors which might properly be considered:

> "The English cases referred to above, and others that might be cited, establish the rule that, in passing upon the question of undue or unreasonable preference or disadvantage, it is not only legitimate, but proper, to take into consideration, besides the mere differences in charges, various elements, such as the convenience of the public, the fair interest of the carrier, the relative quantities or volume of the traffic involved, the relative cost of the services and profit to the company, and the situation and circumstances of the respective customers with reference to each other, as competitive or otherwise" (pp. 53-54).

Judge Jackson's opinion was later referred to with approval by this Court in *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission* (1896), 162 U. S. 197, 233, wherein the Court held that in passing upon questions arising under the Interstate Commerce Act, the tribunal appointed to enforce its provisions should take into consideration "the legitimate interests * * * of the carrying companies * * *". It was also cited with approval by the district court in *McNeil and Sons* v. *Western Maryland Ry. Co.* (1930), 42 Fed. (2d) 669, 675-676; affirmed 51 Fed. (2d) 1073; petition for writ of certiorari denied, 284 U. S. 665.

That carriers may properly consider the relative yield under rates applicable between different origins and destinations in determining the privileges which shall be accorded thereunder, is undoubted. In *Cotton from and to Points in Southwest and Memphis*, 208 I. C. C. 677, at page 724, the Commission stated:

> "The practices which may have prevailed in the past with respect to free transit are no criteria in the present circumstances. In the past there was substantially no unregulated competition and the rates were not depressed. If the carriers gave a free service in one instance it was not unreasonable to expect them to give it in another. Now the situation has changed. In the present circumstances it is not only the carriers' right but their duty to conduct their operations in the most economical manner possible, in order to retain the greatest net revenue out of the low competitive rates which they are compelled to charge. The fact that they have provided certain transit services without charge in addition to the transportation rates, in instances where that seems to be good business policy from a competitive standpoint, affords no basis for requiring them to assume the additional burden and expense incident to such services where the opportunities for corresponding benefits to them are lacking" (p. 724).

Moreover, in *Routing Cottonseed to Kansas and Missouri*, 231 I. C. C. 775, 779, the Commission held that the action of certain carriers in according lower cut-back rates when they retained the long hauls on the outbound products than when they received lesser hauls on the outbound products, constituted a sufficient difference in circumstances and conditions to relieve them of the charge of unjust discrimination. The Commission stated:

> "Protestants further contend that when there are two mills located at the same point on respondents' lines an unlawful situation would be created if one mill shipped out over a route which entitled it to the cut-back rates while the other did not. Apparently

the same situation prevails today. This is simply a matter of a mill availing itself of the cut-back rates, with their limitations, or not doing so. Differing circumstances and conditions may justify differences in charges. In the present situation the fact that respondents are accorded their long haul on the outbound-products movement is a sufficient difference in circumstances and conditions to justify assessing, in connection with such movements, the lower cut-back rates in lieu of the higher gross local rates" (P. 779).

The foregoing decisions of the courts and the Commission establish that the relative earnings of carriers for transportation between different origins and destinations, as well as difference in competitive conditions, constitute justification for difference in the services accorded shippers, without violation of the prohibitions of Section 3(1).

Manifestly, the fact that the rates for line-haul transportation between Oklahoma and the Southeast are on a relatively lower basis than like rates for such transportation between Oklahoma and the Texas Gulf ports, warrants the continuance of the loading charge from Oklahoma to the Southeast and its elimination from Oklahoma to the Texas Gulf ports and Lake Charles, La.

Appellant does not contend that differences in the matter of truck competition and in the level of rates for transportation do not represent dissimilar circumstances which may be taken into account in considering whether there has been a violation of the provisions of Section 3(1). It argues only that the lawfulness of the free-loading provision contained in the tariffs under consideration must be determined independently without consideration of the effect thereof upon the line-haul rates for transportation (Br. pp. 46-48). For reasons already stated in the discussion under Section 2, this contention is erroneous. The loading service represents but a component part of the entire service of transportation and cannot rightly be viewed

independently in determining the matter of undue preference and undue prejudice under Section 3(4).

In conclusion of law No. 4, the District Court stated that in determining whether or not the provisions of Section 3(1) of the Interstate Commerce Act have been violated by the publication of the tariffs under consideration, the Commission properly considered the dissimilarity in circumstances and conditions between the line-haul movement of cotton from Oklahoma origins to the Southeast and the line-haul movement of cotton from Oklahoma points to the Gulf ports (R. 84). For reasons hereinabove stated, the conclusion thus stated by the District Court is entirely sound and proper.

The Order of the Commission Is Adequately Supported by Essential Findings.

Appellant contends that the order of the Commission is not supported by findings sufficient to disclose a correct application of statutory standards (Br. pp. 25-31). It does not, of course, assert that the Commission failed to make an ultimate finding respecting the lawfulness of the tariffs under consideration, inasmuch as the Commission expressly held that "the elimination of the rail carriers' loading charge on cotton originating in Oklahoma on respondents' lines, compressed in transit and moving from compress point to Texas-Gulf ports and Lake Charles, La., at the carload rate from origin point, is just and reasonable and not shown to be otherwise unlawful" (R. 31-32). It alleges only that the Commission omitted to make "preliminary" findings upon which such ultimate finding was based (Br. p. 26).

By the terms of Section 14 of the Interstate Commerce Act, it is provided that whenever an investigation is made by the Commission "it shall be its duty to make a report in writing . . . which shall state the conclusions of

the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded, such report shall include the findings of fact on which the award is made." It is necessary only that the Commission state its conclusions, unless damages are to be awarded.

Examination of the report and order of the Commission in I. & S. No. 4981, under consideration herein, reveals that the Commission fully complied with the statutory provisions and the court decisions interpreting the same. Formal and precise findings are not required. It is not the form but the substance of the findings that controls. It is enough if the findings be stated, whether in narrative form or otherwise, in such fashion that it definitely appears upon what facts the Commission reached its decision. *Quanah, A. & P. Ry. Co. v. United States*, (1939) 28 Fed. Supp. 916, affirmed 308 U. S. 527; rehearing denied 309 U. S. 694. See also *Davidson Transfer & Storage Co. v. United States*, (1942), 42 Fed. Supp. 215, affirmed 87 L. ed. 21.

In *Quanah, A. & P. Ry. Co. v. United States, supra*, the statutory court, composed of Hutcheson, Circuit Judge, and Bryant and Davidson, District Judges, had under consideration an order of the Commission cancelling a transit arrangement whereby products milled from cottonseed, moved in carloads into certain milling points, could be shipped to final destination at the through railroad rate from points where the cottonseed originated. In disposing of plaintiff's contention that the order was void because unsupported by requisite findings, the court stated:

> "We may agree with the plaintiff that the report of the Commission would have been better drawn if instead of the finding 'we find that the proposed schedules have not been justified,' there had been a positive finding that 'the proposed schedules are unjust and unreasonable, and unduly prejudicial in violation of the Act.' We are not in any doubt, though,

that when read in connection with the positive and definite finding that the schedules must be cancelled, and in the light of the detailed findings in the report, the finding in question must be taken to be a finding that the condemned practice is unreasonable and violative of the Act; nor are we in any, that plaintiff's first point, that the order falls for want of definite findings, must be rejected" (p. 917).

Then, after reviewing the extent to which the Commission's report analyzed the physical and economic factors which entered into and affected the proposed arrangement and the injurious results which would follow the institution of the practice, the loss of revenues to the contesting rail carriers in the general disruption of working rates and arrangements with resulting confusion and loss to all concerned, the court concluded:

> "Under the settled rule that it is not the form but the substance of the findings and order which controls, these findings are ample. *Powell* v. *United States*, 300 U. S. 276, 57 S. Ct. 470, 81 L. Ed. 643; *Alton Railroad Company* v. *United States*, 287 U. S. 229, 53 S. Ct. 124, 77 L. Ed. 275; *United States* v. *Louisiana*, 290 U. S. 70, 54 S. Ct. 28, 78 L. Ed. 181; *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 490, 38 S. Ct. 383, 62 L. Ed. 831; *Florida* v. *United States*, 282 U. S. 194, 51 S. Ct. 119, 75 L. Ed. 291" (p. 918).

The report of the Commission under consideration herein bears a close resemblance to the report reviewed by the statutory court in the foregoing proceeding. The Commission did not specifically find that the cancellation of the loading charge was lawful and proper in terms of the provisions of Sections 2 and 3(1), but found that the cancellation of the loading charge was "just and reasonable and not shown to be otherwise unlawful" (R. 31-32). It had previously stated that "from the evidence presented in the instant proceedings it has not been shown that any provisions of the Interstate Commerce Act would be vi-

olated if the suspended Oklahoma rule is permitted to become effective" (R. 30).

Like the report considered in the *Quanah case*, the report is not couched in terms of the precise language contained in Sections 2 and 3(1). However, the language of the Commission is the equivalent of a finding that the cancellation of the loading charge is not in violation of Sections 2 or 3(1). This is acknowledged by appellant at page 26 of its brief. Such an ultimate finding has been held to be all that is required in the disposition of an issue under Section 3. *Chesapeake & Ohio Ry. Co.* v. *United States*, 11 Fed. Supp. 588, 593, affirmed 296 U. S. 187.

Moreover, examination of the Commission's report clearly reveals the basis of its ultimate finding, and discloses the facts and circumstances upon which it was predicated. The Commission analyzed the situation leading to the cancellation of the loading charge at considerable length, and described the trucking competition encountered by the carriers between Oklahoma and the Texas Gulf ports and its absence between Oklahoma and the Southeast and the relative levels of rates to the different destinations. This is all that is required. As stated by the Supreme Court in *Colorado* v. *United States*, (1926), 271 U. S. 153, 169, "an examination of the extensive record and of the * * * opinions of the Commission convinces * * * that no relevant fact was ignored, that there was ample evidence to support the facts found, * * *."

Appellant's insistence that the Commission erred in failing to make specific findings under Section 2 does not merit serious consideration. The provisions of Section 2, as above indicated, have application only when shipments move from and to the same points over the same routes of movement. Obviously, plaintiff's shipments from Oklahoma to the Southeast do not move from and to the same points or via the same routes of movement as does cotton shipped by other shippers from Oklahoma to the

Texas Gulf ports. Finding to that effect would have been entirely superfluous.

The absence of truck competition from Oklahoma to the Southeast and relatively lower rail rates from Oklahoma to the Southeast, as hereinbefore indicated, constitute dissimilar circumstances which justify continuance of the loading charge on cotton from Oklahoma to the Southeast and its elimination from Oklahoma to the Texas Gulf ports.

Appellant contends that these facts are not specifically embraced in Commission findings (Br. pp. 26-27). True, they are not set forth in the portion of the Commission's report in which are stated certain "pertinent facts" (R. 30-32; 248 I. C. C. 653-654), but they are stated elsewhere in the report. The Commission points out that reductions were made in through rates for the purpose of more adequately meeting truck competition (R. 22); that the competition with trucks in Texas was found to be greater to the Gulf ports than from Oklahoma points to the Gulf ports (R. 24); that cotton is handled by truck from gin points to compress stations and interstate destinations and by truck from compress stations in Oklahoma (R. 22-23); that there is no trucking of cotton from Oklahoma to Memphis or to the Southeast (R. 23); and that the rates to the Southeast are lower relatively than they are to the Texas ports (R. 23). (248 I. C. C. 648-650.)

Obviously, reduction in through rates to meet truck competition is recognition of the existence of truck competition between Oklahoma and the Texas ports. The movement of cotton by truck from gin points to compress points is likewise indicative of the existence of through truck competition since cotton which is trucked into a compress point normally may be expected to be trucked from such compress point to the Texas-Gulf ports. In its report the Commission quotes with approval from statement made by it in *Cotton From and To Points In Southwest and Memphis*, 208 I. C. C. 677, 695, to the effect that "most of the railroads

concerned are apprehensive, and apparently with good reason, that once the cotton is on a truck it may be carried by the truck all the way to a port * * *" (R. 22).*

Appellant contends that such statements merely represent a recital of the contentions of the respondents in I. & S. No. 4981 (Br. pp. 27-31). This contention is unsound. The existence of the facts above discussed was established by the testimony of respondents' witnesses and was supported by factual data contained in the record. The fact that the Commission, upon consideration of such testimony and data, has accepted the proof offered by respondents in respect thereto, does not relegate such statements to the status of a mere recital of the contentions of respondents.

Despite the fact that appellant contends that the Commission failed to make findings sufficient to disclose a correct application of statutory standards, seemingly it does not entertain any doubt respecting the factors which prompted the Commission's decision. In Petition for Reconsideration filed by it with the Commission under date of February 18, 1942 (R. 35), it argued that Division 3 erred in its report of January 29, 1942, in the following particulars:

> "1. In finding that there is a difference in circumstances and conditions surrounding cotton shipped from Oklahoma to the gulf ports, on the one hand, and cotton shipped from Oklahoma to the southeast and the Carolinas, on the other hand, in the matter of truck competition encountered by the respondents.
>
> 2. In finding that the line-haul rates on cotton, in carloads, from Oklahoma to the southeast are relatively lower than to the Texas ports" (R. 35).

From examination of the statements made by the Commission in its report, it is manifest that the Commission made essential findings of fact and that Finding 24 of the District Court is proper.

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*Quoted with approval by several witnesses for respondents (R. 116, 154); one of them testified that cotton that is trucked from a compress is ordinarily cotton that was trucked to the compress (R. 140).

The Order of the Commission Is Adequately Supported by the Evidence.

In a long line of decisions the Supreme Court has held that as long as there is warrant in the record, the judgment of administrative tribunals, such as the Interstate Commerce Commission, must stand; that the determinations of such bodies will not be set aside if there is evidence to support them, even though the court considering the matter independently might have reached a different conclusion. The judicial function is exhausted when the court finds that there is a rational basis for the conclusion reached. For recent decisions so holding, see: *Swayne & Hoyt, Ltd.* v. *United States* (1937), 300 U. S. 297, 304; *Rochester Telephone Corporation* v. *United States* (1939), 307 U. S. 125, 145-146; *United States* v. *Louden* (1939), 308 U. S. 225, 231; *Labor Board* v. *Link-Belt Co.* (1941), 311 U. S. 584, 597.

Whether discrimination in rates or services of a carrier is undue or unreasonable has always been regarded as peculiarly a question committed to the judgment of the administrative body based upon the application of an informed judgment to all the facts and circumstances affecting the traffic. What amounts to such discrimination is a question, not of law, but of fact, with which the administrative body was created to deal. *Swayne & Hoyt, Ltd.* v. *United States* (1937), *supra*; *United States* v. *L. & N. R. Co.* (1914), 235 U. S. 314, 320; *Pennsylvania Co.* v. *United States* (1915), 236 U. S. 351, 361; *Manufacturers Ry. Co.* v. *United States* (1918), 246 U. S. 457, 482; *United States* v. *Chicago Heights Trucking Co.* (1940), 310 U. S. 344, 352-3.

Appellant admits that the evidence supports the statements made in the report of the Commission respecting the difference in truck competition between Oklahoma and the Texas ports and between Oklahoma and the Southeast (Br.

32).* It contends only that such statements and the evidence in support thereof fail to show a difference between cotton handled from gin to compress which is later reshipped to the Southeast, on the one hand, and cotton handled from gin to compress which is later reshipped to the Texas ports, on the other hand (Br. 32). For reasons hereinbefore stated, appellant's position in this respect is entirely fallacious. It is the truck competition between Oklahoma and the Texas ports and the absence of such competition between Oklahoma and the Southeast which constitutes the dissimilar circumstance justifying removal of the loading charge in the case of shipments destined to the Texas ports and its continuance in the case of shipments destined to the Southeast.

Appellant also contends that the record is devoid of evidence from which the Commission could properly find the existence of a relatively lower basis of rates between Oklahoma and the Southeast than between Oklahoma and the Texas ports. This contention is equally erroneous. In the course of his testimony, one of the witnesses for the respondents before the Commission stated that a further justification for failure of respondents to remove the loading charge in the case of cotton destined to the Southeast was the fact that "the rates to the Southeast are already lower, relatively, than they are to the ports" (R. 137). Appellant states that the witnesses did not elaborate on the actual statement just quoted (Br. p. 32). However, the witness' testimony stands entirely unchallenged and uncontradicted. Appellant was represented at the hearing by counsel and offered testimony through a witness. It made no effort to refute witness for respondents' assertion in this connection.

Another witness for respondents presented Exhibits 32 to 39 inclusive (R. 269-273), which consist of maps and comparative statements of distances, rates, earnings per

* For evidence respecting the matter, see R. 115-122, 137-139.

ton-mile and per car-mile from Oklahoma origins to Houston, Texas, and to Southeast destinations. The data contained in these exhibits establish that relatively lower earnings per ton-mile and per car-mile are derived by the carriers from the present carload rates on cotton from Oklahoma to points in the Southeast than from Oklahoma to the Texas Gulf ports. For example, Exhibit 38 shows that the earnings produced by the rates on cotton between Oklahoma City and Columbia, S. C. vary between 11.2 mills per ton-mile and 13.7 mills per ton-mile and between 17.2 cents per car-mile and 29.1 cents per car-mile, whereas similar earnings received by the carriers from rates on cotton between Oklahoma City and Houston, Texas, vary between 17.7 mills per ton-mile and 23.8 mills per ton-mile and between 30.1 cents per car-mile and 57.4 cents per car-mile (pp. 2, 3). The comparative earnings thus shown by Exhibit 38 corroborate the undisputed testimony of the witness for respondent to the effect that the rates to the Southeast are relatively lower than the rates to the Texas ports.

Generally speaking, as stated by appellant (Br. 33-34), the unit cost of transportation diminishes with increased length of haul, and Columbia, S. C. is further distant from Oklahoma City than is Houston, Texas (1193 v. 453). But the rate of progression in distance rate scales is not governed entirely by cost considerations.* The per ton-mile and per car-mile earnings produced by the rates applicable between Oklahoma City and Houston would not be so much greater than similar earnings under the rates applicable between Oklahoma City and Columbia if cost alone had been the controlling element in the determination of the distance scales between such points.

* *Southern Class Rate Investigation*, 100 I. C. C. 513, 630-631; *Consolidated Southwestern Cases*, 205 I. C. C. 601, 642-646; *Western Trunk-Line Class Rates*, 164 I. C. C. 1, 189-190; *Grain Case Modifications*, 223 I. C. C. 235, 243.

The Commission had available for its consideration the data contained in Exhibits 33 to 39 inclusive. It was acquainted with the history of the rate scales in question and the economic and other considerations involved in their construction. In its report, it quoted from its decision in *Cotton from and to Points in Southwest and Memphis*, 208 I. C. C. 677, 718, wherein it stated "It is conceded that the rates to southern mill points from Oklahoma are graded up very slowly as the distance increases * * *", (R. 24) (248 I. C. C. 643, 650). Its conclusion that "the rates to the Southeast are relatively lower than to the Texas-Gulf ports" (R. 24), is unquestionably supported by the evidence.

Appellant's contention that the record contains no other evidence bearing upon the question of relative levels of line-haul rates between Oklahoma and the Texas ports and between Oklahoma and the Southeast, than that offered by witnesses for respondents, is patently erroneous (Br. p. 33). Mr. C. B. Bee, Traffic Adviser and Special Counsel for the Corporation Commission of the State of Oklahoma, which maintains a department especially for the purpose of looking after interstate railroad rate matters in Oklahoma, testified that rates on cotton from Oklahoma to the Southeast are relatively more depressed than rates on cotton from Oklahoma to the Texas ports. In response to the question whether the same reductions in rates on cotton were not made from Oklahoma to the Southeast as were made in the preceding year from Oklahoma to the Texas ports, he stated:

> "No, sir, not relatively. That is just exactly the point; the same reductions in cents per hundred pounds were made to the Southeast, but not relatively as to cost, I wouldn't say. If you will take your rate from Oklahoma to the Southeast, and the rates from Oklahoma to the Gulf, and measure them on a mileage basis, the rates from Oklahoma to the Southeast are much lower, and, therefore, I think that you might put 5

cents or 5½ cents a bale into the one rate, and not into the other, and still not have discriminatory conditions" (R. 247-248).

In Finding 21, the District Court stated that the evidence before the Commission was confined to a comparison of the rates, distances, ton-mile earnings and car-mile earnings involved and that no evidence was offered as to the specific costs of the respective line-haul services or as to any transportation circumstance and condition incident to line-haul services other than the mere matter of distance (R. 82). Manifestly, this particular finding of the District Court is in error. The record contains the unchallenged and undisputed testimony of Mr. Bee, the traffic expert for the Oklahoma Commission, to the effect that rates to the Southeast are relatively more depressed than rates to the Texas ports in consideration of "cost."

Appellant further contends that the lawfulness of rates and charges depends on many elements and facts and that if the Commission erred as to one factor only on which it relied in its final determination, its order should nevertheless be enjoined because this Court is not in a position to say that the Commission would have come to the same ultimate conclusion if that factor be laid aside from view (Br. p. 34). Appellant thus argues that the order should be enjoined for lack of evidence respecting the relative level of the line-haul rates *despite the fact that appellant itself admits the difference in truck competition which was also relied upon by the Commission.*

Appellant's contention in this respect is, of course, incorrect. Both the difference in the level of line-haul rates and difference in truck competition are adequately supported by the evidence. However, difference in truck competition alone is sufficient to support the order. The existence of truck competition at one point and not at another, as previously discussed herein, amply warrants a differ-

ence in rates and charges without offending the provisions of Section 3(1). The fact that another similarly valid difference may not be found to exist does not render the Commission's order invalid.

CONCLUSION.

Railroad appellees respectfully submit that the decree of the District Court should be affirmed.

Respectfully submitted,

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APPENDIX A.

Pertinent Provisions of the Interstate Commerce Act, as Amended.

The Interstate Commerce Act, as amended, is found in Title 49, U. S. C., 1940 Edition. The section numbers in Title 49 of the U. S. Code are the same as in the Interstate Commerce Act, as amended.

SECTION 1(3)(a)-(49 U. S. C. 1(3)(a)).

(Paragraph 3(a) of Section 1 defines the term "transportation," used in the Act, as including all services in connection with the handling of property transported.)

(3) (a) The term "common carrier" as used in this part shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this part it shall be held to mean "common carrier." The term "railroad" as used in this part shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.

The term "person" as used in this part includes an individual, firm, copartnership, corporation, company, association, or joint-stock association; and includes a trustee, receiver, assignee, or personal representative thereof.

SECTION 2 (49 U. S. C. 2).

(Section 2 prohibits and declares to be unlawful unjust discrimination and defines what constitutes unjust discrimination.)

SEC. 2. That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

SECTION 3(1) (49 U. S. C. 3(1)).

(Paragraph (1) of Section 3 provides that undue preference and undue prejudice shall be unlawful.)

(1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination,

prejudice, or disadvantage to the traffic of any other carrier of whatever description.

SECTION 6(1) (49 U. S. C. 6(1)).

(Paragraph (1) of Section 6 requires carriers to publish and file all rates and charges and to separately state all terminal charges which affect the aggregate thereof.)

(1) That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part.

SECTION 14(1) (49 U. S. C. 14(1)).

(Paragraph (1) of Section 14 requires that the Commission make a report and state its conclusions.)

(1) That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made.

SECTION 15(1) (49 U. S. C. 15(1)).

(Paragraph (1) of Section 15 confers power on the Commission to prescribe lawful charges in lieu of those found to be unlawful after hearing on complaint or on its own motion.)

(1) That whenever, after full hearing, upon a complaint made as provided in Section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be there-

after followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

SECTION 15(7) (49 U. S. C. 15(7)).

(Paragraph (7) of Section (15) confers on the Commission the power to suspend and investigate changes in rates and charges and to prescribe lawful charges in lieu of those found to be unlawful after full hearing.)

(7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders, without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon, the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had

become effective. If the proceeding has not been conc
and an order made within the period of suspension
proposed change of rate, fare, charge, classification, r
tion, or practice shall go into effect at the end of
period; but in case of a proposed increased rate or c
for or in respect to the transportation of property
Commission may by order require the interested c
or carriers to keep accurate account in detail of all am
received by reason of such increase, specifying by
and in whose behalf such amounts are paid, and upon
pletion of the hearing and decision may by further
require the interested carrier or carriers to refund,
interest, to the persons in whose behalf such am
were paid, such portion of such increased rates or ch
as by its decision shall be found not justified. A
hearing involving a change in a rate, fare, charge, or
sification, or in a rule, regulation, or practice, affe
date this amendatory provision takes effect, the b
of proof shall be upon the carrier to show that the
posed changed rate, fare, charge, classification, rule,
lation, or practice is just and reasonable, and the Co
sion shall give to the hearing and decision of such
tions preference over all other questions pending b
it and decide the same as speedily as possible.